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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 CR 417 (CR)

5 ALI KOURANI,

6 Defendant.

7 -----x

8 New York, N.Y.

9 May 1, 2019

11:00 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

United States Attorney for the

16 Southern District of New York

AMANDA HOULE

17 EMIL BOVE

Assistant United States Attorneys

18 ALEXEI SCHACHT

19 Attorney for Defendant

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(Case called)

MS. HOULE: Good morning, your Honor, Amanda Houle and Emil Bove. With the government at counsel table is paralegal specialist Margaret Shields as well as a special agent from the FBI, Keri Shannon.

THE COURT: Who is who?

MS. HOULE: First is Ms. Shields, to her right is Ms. Shannon.

THE COURT: Good morning.

MR. SCHACHT: Good morning, your Honor, Alexei Schacht for Ali Kourani.

THE COURT: Good morning, Mr. Kourani.

How do you want me to proceed, Ms. Houle?

MS. HOULE: Your Honor, if we could start, there's one point that the parties just discussed which relates to two limiting instructions that the government proposed, and we understand from defense counsel this morning that they are unobjected to.

THE COURT: They're not objected to.

MS. HOULE: That's correct.

THE COURT: Is that right, Mr. Schacht?

MR. SCHACHT: It is correct, your Honor. They've proposed one of their limiting instructions concerning an expert witness, Mr. Levitt, who they want to call. And I don't object to the instruction, but I told the government I might

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1 object to some of his testimony, but that's a separate issue.

2 But I wanted to be clear about that.

3 THE COURT: Should I know now what you're going to
4 object to?

5 MR. SCHACHT: I need to talk to my client about it,
6 which I could do right now or I could do it tomorrow and send
7 the Court a letter. I think it's also possible I won't object,
8 I just --

9 THE COURT: Why don't you take until Monday morning to
10 figure out what you want to do?

11 MR. SCHACHT: I will know -- I'm meeting with my
12 client tomorrow, so I will have an answer tomorrow. Thank you
13 very much.

14 MS. HOULE: So just to be clear, your Honor, that's
15 the instruction that the government proposed in its April 23rd
16 letter as to Dr. Levitt.

17 THE COURT: When do you want me to give this
18 instruction?

19 MS. HOULE: Following Dr. Levitt's testimony.

20 THE COURT: Mr. Schacht, is that okay with you?

21 MR. SCHACHT: It is okay with me, your Honor. My only
22 question is he's supposedly an expert on Hezbollah, I wanted to
23 talk to my client to make sure, we may have some objections
24 about some of the specific things that he would say. I'm not
25 objecting to him as a witness coming to court.

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1 THE COURT: You don't really know what he's going to
2 say, do you?

3 MR. SCHACHT: I have spoken to the government and they
4 have given me a kind of verbal proffer of some of the things he
5 may say.

6 THE COURT: What do the criminal rules provide on
7 this, Ms. Houle? What do you have to give?

8 MS. HOULE: Your Honor, the criminal rules as to the
9 notice we gave, we gave expert notice to the defense, and we
10 have separately had discussions with the defense about
11 additional specifics of Dr. Levitt's testimony. We've also
12 turned over to the defense articles written by Dr. Levitt and
13 certain prior testimony that he gave so that they have a full
14 understanding of the topics he will discuss.

15 THE COURT: So Rule 16 --

16 MR. SCHACHT: Judge, I could be helpful I'm not
17 objecting to their notice.

18 THE COURT: Let me do this, Mr. Schacht.

19 MR. SCHACHT: Yes.

20 THE COURT: Subparagraph G under Rule 16 provides at
21 the defendant's request, the government must give to defendant
22 a written summary of any testimony that the government intends
23 to use under Rule 702, 703 or 705 of the Federal Rules of
24 Evidence during its case in chief at trial. So the question
25 is: Did the government provide such a written?

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1 MR. SCHACHT: Yes, they have, your Honor. But what my
2 possible objection is is the witness may describe certain
3 things that he says Hezbollah did; not that my client
4 personally did, but that other people supposedly in Hezbollah
5 did. I may want to object to that and say that he does not
6 have a sufficient basis to say that Hezbollah did these certain
7 things.

8 THE COURT: You'll be cross-examining him.

9 MR. SCHACHT: I will have the right to cross-examine
10 him, yes.

11 THE COURT: What if he's qualified as an expert on
12 this general subject? He's going to testify in a manner that
13 you may find objectionable. So the question is not whether
14 he's right or wrong but whether he's qualified to testify. You
15 have your challenge at cross.

16 MR. SCHACHT: That's true, I could, but with certain
17 types of objections, even though you might sustain my
18 objection, it might be preferable for me to have this resolved
19 in advance of his testimony.

20 THE COURT: I think, Mr. Schact, that this should be
21 the subject of an in limine motion and I should rule on this
22 before the jury is convened.

23 MR. SCHACHT: Yes. And your Honor, to be clear, I'm
24 not saying I'm even going to object.

25 THE COURT: I understand that.

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1 MR. SCHACHT: I will let you know.

2 THE COURT: If you do object, I would like to rule on
3 the issue before the jury is convened.

4 MR. SCHACHT: That's fair, and if I do object, I will
5 make a brief motion in limine.

6 THE COURT: When will I do that?

7 MR. SCHACHT: I will do that by --

8 MS. HOULE: Sorry to interrupt, I just note for
9 scheduling purposes Dr. Levitt is our second witness, so to the
10 extent this could be resolved before Monday, that would be
11 preferable.

12 THE COURT: I understand.

13 MR. SCHACHT: I could file the motion, if I file a
14 motion at all, by the close of business tomorrow.

15 THE COURT: Let's go off the record for a moment.

16 (Discussion held off the record)

17 THE COURT: I'm setting aside 2:30 tomorrow
18 afternoon --

19 MR. SCHACHT: And your Honor, I'll let you know.

20 THE COURT: Can I finish?

21 MR. SCHACHT: Yes, your Honor.

22 THE COURT: I'm setting this down for 2:30 tomorrow
23 afternoon for argument with respect to the specific aspects of
24 Mr. Levitt's testimony to which Mr. Schact wanted to object.

25 Now this raises the question, does Mr. Schact know

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1 what it is Mr. Levitt will be testifying about?

2 MS. HOULE: Yes, your Honor. We have given notice of
3 the substance of his testimony and the defense doesn't dispute
4 that. They have said that our notice is sufficient.

5 THE COURT: So if you want to proceed with this
6 objection, we'll come into the 2:30 conference.

7 MR. SCHACHT: If I do not, may I submit a letter
8 tonight and we'll cancel court tomorrow?

9 THE COURT: Yes.

10 Is that satisfactory?

11 MS. HOULE: Yes. And my understanding is, regardless,
12 the defense will file a letter this evening that will either
13 lay out the objection or say that no conference is necessary.

14 MR. SCHACHT: Yes, I agree.

15 THE COURT: Okay. Good.

16 MS. HOULE: So just to close the loop on this point,
17 your Honor, the government's motion for the limiting
18 instruction following Dr. Levitt's testimony is unopposed, and
19 we understand your Honor will give that instruction.

20 THE COURT: That's correct.

21 MS. HOULE: Thank you. There's one other limiting
22 instruction proposed by the government that is not objected to
23 by the defense, and that is an instruction proposed in the
24 government's letter of April 22nd.

25 THE COURT: Which is that?

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1 MS. HOULE: It's on page 4, and it relates to the
2 topic of Mr. Denbeaux's testimony. The government has proposed
3 that following Mr. Denbeaux's testimony that the jury be
4 instructed that the jury should rely on your Honor's
5 instructions as to the law and not any legal conclusions that
6 Mr. Denbeaux has offered or other instructions. And the
7 defense does not object to that.

8 THE COURT: What do you expect to elicit from
9 Mr. Denbeaux? Is he going to be a witness, Mr. Schacht?

10 MR. SCHACHT: I'm undecided whether he will be a
11 witness. If he is a witness, though, I plan on only eliciting
12 testimony from him concerning what occurred in the meetings
13 that the government has witnesses to also. And those would not
14 be privileged conversations, obviously, because they occurred
15 in front of FBI agents.

16 THE COURT: So you would not be giving -- you will not
17 be eliciting testimony about any legal advice that Mr. Denbeaux
18 gave to Mr. Kourani?

19 MR. SCHACHT: I wouldn't seek to elicit any testimony
20 concerning confidential legal advice that he gave. He did give
21 legal advice in front of the FBI agents. They were together
22 for many hours.

23 THE COURT: So whatever he's going to testify to, it's
24 going to be testified that he says it was given in front of FBI
25 agents.

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1 MR. SCHACHT: Yes, your Honor.

2 MS. HOULE: Your Honor, even as to that testimony,
3 there is an implicit legal conclusion in Mr. Denbeaux's
4 analysis. He handed the FBI agents a document that says that
5 the defendant had committed no crimes. That is confusing for
6 the jury to hear a lawyer say that the defendant hasn't
7 committed any crimes, which is the ultimate question for the
8 jury, and it's an application of the law to the facts of this
9 case. So we still believe that this limiting instruction is
10 appropriate.

11 THE COURT: You'll be cross-examining Mr. Denbeaux on
12 that. Why do you need my instructions?

13 MS. HOULE: To make clear to the jury that they should
14 not be relying on Mr. Denbeaux's legal analysis.

15 THE COURT: But you will cross-examine him on this.

16 MS. HOULE: We will, your Honor, and although --

17 THE COURT: Why should I be bolstering what you do?

18 MS. HOULE: I don't think it's bolstering, your Honor,
19 because all we are asking is for the Court to make clear that
20 it is solely your Honor's province to instruct them on the law.
21 Typically any testimony relating to legal conclusions or legal
22 advice is excluded. Here, the defense has indicated that they
23 want to present that testimony as it was relevant to
24 Mr. Kourani's state of mind.

25 THE COURT: Are you okay with, Mr. Schacht?

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1 MR. SCHACHT: I am okay with you, yes, telling the
2 jury that you're the judge of the law and your view of the law.
3 I have seen their specific language, but I don't want to be
4 accused of later on sandbagging the Court or the government.

5 THE COURT: Let's be clear, the government wants me to
6 say at some point during or immediately following Denbeaux's
7 testimony as follows: You heard testimony regarding certain
8 legal conclusions and advice by Mark Denbeaux. It is my duty
9 to instruct you as to the law. It's your duty to accept my
10 instructions of law and apply them to the facts as you
11 determine them. You must take the law as I give it to you. If
12 you have heard any legal principles different from any that I
13 state to you in my instructions, it's my instructions that you
14 must follow. Mr. Denbeaux's legal conclusions may not replace
15 your own. "Your own" is wrong here. Should not replace those
16 I give.

17 MS. HOULE: Yes, your Honor.

18 THE COURT: That's what the government wants, your
19 Honor. Mr. Schacht, do you want me to give that?

20 MR. SCHACHT: No, I don't want you to give that, but I
21 don't object to it.

22 THE COURT: If you don't object, I'm going to give it.
23 If you object, I will consider it.

24 MR. SCHACHT: That's fine, but what I wanted to say
25 though, because I don't want to have a fight in front of the

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1 jury later on, I do plan --

2 THE COURT: There will be no fighting before the jury.

3 MR. SCHACHT: I do plan on making the argument,
4 though, that the things that Mr. Denbeaux said to the FBI in my
5 client's presence affected my client's state of mind. And so I
6 want to be able to make the argument that what Denbeaux said,
7 even if it was erroneous, affected my client's state of mind.
8 And I think I should be allowed to make that argument.

9 THE COURT: I don't know exactly -- I understand what
10 you want to say, and unless the government objects, you can
11 make those arguments.

12 MS. HOULE: We don't object to that argument.

13 THE COURT: Do not.

14 MS. HOULE: That's correct. But we do think that it
15 warrants this limiting instruction.

16 THE COURT: The instruction should be more specific
17 than this. Am I going to tell the jury at some point something
18 that is the same or is different from what Denbeaux says?

19 MS. HOULE: Well, your Honor, we don't know exactly
20 what Mr. Denbeaux is going to say, but for example --

21 THE COURT: Yes, you do. We heard it in the
22 suppression hearing.

23 MS. HOULE: Right. So at the suppression hearing he
24 said things like: It was my understanding that receiving
25 military training from Hezbollah in Lebanon was not a crime in

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1 the United States. That is not the law.

2 THE COURT: Why is that relevant for him to say that?

3 MS. HOULE: It's not relevant, but that's what he
4 testified to at the suppression hearing as the basis for his
5 advice and his conclusion in that document that he's going to
6 testify about that the defendant had not committed any crimes.

7 THE COURT: Okay. I got your point and I will give
8 the instruction that you want me to do.

9 MS. HOULE: Thank you, your Honor.

10 This leads to the point of the waiver of the
11 attorney-client privilege. The defendant filed a document with
12 the Court acknowledging that he's waiving privilege, that he's
13 prepared to have Mr. Denbeaux testify and be questioned about
14 advice that was given. And so the government proposed an order
15 to the Court so that the government may review the defendant's
16 communications with Mr. Denbeaux in advance of trial. And that
17 includes text messages and emails that were seized from the
18 defendant's accounts.

19 THE COURT: Mr. Schacht?

20 MR. SCHACHT: She's correct, your Honor. I don't
21 object to that. As you know I uploaded it on ECF. My client
22 signed that waiver.

23 THE COURT: But Ms. Houle wants me to sign an order.

24 MR. SCHACHT: Yeah, I'm fine with that, your Honor.
25 Honestly, I think this is not even really going to become an

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1 issue at trial, but it's fine if you sign it.

2 THE COURT: Do you want me to sign it, Ms. Houle?

3 MS. HOULE: Yes, your Honor.

4 THE COURT: Hand it up.

5 Without objection, I will sign this order.

6 So we'll call it order regarding production by
7 defendant. Okay, Ms. Houle?

8 MS. HOULE: That's fine, your Honor. It isn't limited
9 to production by the defendant because we already have in our
10 possession some of the defendant's communication.

11 THE COURT: I said hereby ordered that following his
12 testimony, prior counsel, that's Mr. Denbeaux, shall produce to
13 the government, et cetera.

14 MS. HOULE: Right. And then there's a paragraph that
15 follows that that relates to relevant communications that are
16 already in the government's possession, and so the order would
17 cover those as well, and that's not objected to by the defense.

18 THE COURT: Order regarding waiver of attorney-client
19 privilege.

20 MS. HOULE: Thank you, your Honor.

21 THE COURT: Are you okay with that as a title,
22 Mr. Schacht?

23 MR. SCHACHT: Yes, your Honor.

24 THE COURT: I have signed it. Ms. Jones will file it.

25 MS. HOULE: Thank you, your Honor.

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1 Your Honor, there are two open --

2 THE COURT: So this means that potentially the trial
3 will stop at the conclusion of Mr. Denbeaux's testimony, and
4 you will then get production of various documents.

5 MS. HOULE: Right. That's possible, your Honor. We
6 don't expect that will slow down the trial schedule.

7 THE COURT: Well, normally you would be starting
8 cross-examination immediately upon the conclusion of
9 Mr. Denbeaux's testimony if he testifies.

10 MS. HOULE: We still plan to start immediately
11 following his testimony, your Honor.

12 THE COURT: Okay.

13 MS. HOULE: Your Honor, there are two open issues
14 relating to the charge. The parties disagree about what
15 instruction should be given regarding the defendant's
16 statements, and also whether or not there should be any
17 instruction on corroboration. I don't think that your Honor
18 needs to address those points in advance of the beginning of
19 trial, we could save that for the charge conference, provided
20 Mr. Schact will not open and to say anything to indicate that
21 corroboration is necessary legally.

22 THE COURT: Am I correct, Mr. Schact, there is to
23 independent requirement of corroboration under federal law?

24 MR. SCHACHT: I don't think you are correct. I don't
25 think all the elements of the crime need to be corroborated, I

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1 think the current state of federal law is there needs to be
2 some evidence. I think the government agrees with this. Their
3 view is that there is some evidence that supports what the
4 defendant said, although I also agree with the government that
5 perhaps you should delay decision upon this once the evidence
6 is in, because we don't actually know yet, even though we both
7 made predictions about what the evidence will be.

8 THE COURT: I think you're both entitled to a clear
9 ruling on this. Have you given me your proposed instruction?

10 MR. SCHACHT: Yes, your Honor.

11 THE COURT: Ms. Houle?

12 I know you have, Mr. Schact.

13 MS. HOULE: As to corroboration, we don't believe that
14 any instruction is appropriate. The law is clear that
15 corroboration is not required, that the confession may itself
16 be sufficiently reliable to support a conviction, and that the
17 question of corroboration is for your Honor to decide when
18 deciding whether the confession is admissible, and then to
19 address any arguments by the defense following the government's
20 presentation of its evidence under Rule 29 or Rule 33. This is
21 not a function of the jury to decide corroboration and to
22 include an instruction which suggests that there is an
23 additional requirement when there's not.

24 THE COURT: I agree with that, Mr. Schact.

25 MR. SCHACHT: Your Honor, I don't know how could you

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1 agree with that because what just said is self-contradictory.
2 She said there is no requirement of corroboration and it's for
3 you to decide whether there's corroboration. It can't be both.

4 THE COURT: I can decide if the confession or
5 admission by the defendant is admissible, whether it's
6 sufficiently reliable to be admitted. That's my burden, and I
7 will do that. Once it's in evidence, once I say okay, then
8 there's no more legal obligation of telling the jury you have
9 the point of corroboration.

10 MR. SCHACHT: I don't think you can find that, though,
11 until you know what the evidence is. You found already as a
12 matter of law that it was voluntarily given, but that's a
13 separate legal analysis from whether or not it's corroborated
14 sufficiently to be reliable, and you don't yet know what the
15 evidence is going to be because the trial hasn't happened yet.

16 THE COURT: Well, I think the government would
17 probably not be using Mr. Kourani's statements first, or am I
18 wrong?

19 MS. HOULE: So we will be introducing Mr. Kourani's
20 statements through the tomorrow of the FBI witnesses, but there
21 will be additional evidence of that, of his conduct, your
22 Honor.

23 THE COURT: In what sequence?

24 MS. HOULE: We will begin with the testimony of an FBI
25 special agent who did not interview the defendant.

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1 THE COURT: What will that witness say?

2 MS. HOULE: The first witness will be an FBI agent who
3 will testify about the search of the defendant's residence as
4 well as an interview of the defendant in 2016 at Newark
5 Airport. We will then put on Dr. Levitt's testimony. We will
6 then put on witnesses describing evidence obtained from the
7 defendant's computer and electronic accounts.

8 THE COURT: So I will have plenty of basis to
9 determine reliability.

10 MS. HOULE: That's correct, your Honor.

11 THE COURT: Okay, I'm not giving this instruction.

12 MR. SCHACHT: Your Honor, I object to that, because
13 you're prejudging the evidence. You haven't heard what any of
14 these people will say.

15 THE COURT: In any event, it doesn't go to the jury.
16 If you're right about your position, it means I should not
17 allow this statement to come into evidence. Once it's in
18 evidence, the jury doesn't have anything to say on it except as
19 a matter of weight of all the evidence and whether it satisfies
20 the beyond a reasonable doubt standard.

21 MR. SCHACHT: The way the evidence is coming in, then
22 you would be able to make that finding once you heard the
23 evidence. I don't see how you could make the finding not
24 having heard the evidence.

25 THE COURT: I am not giving this instruction.

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1 MR. SCHACHT: I have my objection. Thank you.

2 THE COURT: What else?

3 MS. HOULE: The final contested instruction, your
4 Honor, is what instruction should be given regarding the
5 defendant's statements. The parties agree that there should be
6 some instruction regarding the defendant's statements, that it
7 should include an instruction that the jury should consider
8 what weight, if any, to give the defendant's statements.

9 And the government believes that, in addition, that
10 instruction should include an instruction to make clear to the
11 jury that the defendants -- that the statements were properly
12 admitted, and that they were obtained in a lawful manner. That
13 instruction is consistent with instructions given by many
14 courts in this district.

15 THE COURT: I read the briefing on the issue. The
16 precise wording of what I say will be taken up in the charging
17 conference.

18 MS. HOULE: Understood, thank you, your Honor.

19 THE COURT: Anything else?

20 MS. HOULE: Finally, your Honor, we would just like to
21 allocute the defendant on a rejected plea offer. The
22 government made an offer to the defendant that he may plea to
23 the indictment with guidelines of life imprisonment but he
24 would reserve his right to appeal the suppression decision in
25 this case as to his statement. That offer was rejected --

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1 THE COURT: In other words --

2 MS. HOULE: -- and the defendant indicated he wanted
3 to proceed to trial.

4 THE COURT: -- it was a conditional plea.

5 MS. HOULE: Yes, your Honor.

6 THE COURT: Okay. Mr. Kourani, you've heard what
7 Ms. Houle just said, right?

8 THE DEFENDANT: Yeah, I did.

9 THE COURT: Did you understand that description of the
10 government's offer to have been one that was given to you?

11 THE DEFENDANT: I mean honestly --

12 THE COURT: Do you want to ask the question,
13 Mr. Schacht?

14 MR. SCHACHT: Your Honor, my client understands that
15 that's what the offer was and he rejects that offer. I would
16 prefer --

17 THE COURT: Let me make clear why I'm asking these
18 questions.

19 MR. SCHACHT: My client rejects that offer because he
20 rejects the charges in the indictment that they were seeking or
21 offering him to plead guilty to.

22 THE COURT: I don't need to have reasons. I want to
23 tell you this, Mr. Kourani, why I'm asking these questions.
24 You have a constitutional right to rest on your presumption of
25 innocence. You have a constitutional right to require the

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1 government to try its case. You have no obligation to say
2 anything against yourself. The government must prove the case
3 beyond a reasonable doubt.

4 But what the government is doing is saying that look,
5 I gave you an offer, it should be that if the jury will find
6 against you at the trial you will not be able to say later on
7 that I didn't know I had a chance to have a plea; if I knew I
8 had a chance to make a plea, I would take it, so this
9 conviction can't stand against me, the sentence can't stand
10 against me.

11 That's the purpose of this. The government wants to
12 protect itself, and it has a right to do that, to make it clear
13 on the record that it has made an offer to you and that you,
14 with advice of counsel, have rejected that offer. And I gather
15 from what you said from what Mr. Schacht said and what Ms. Houle
16 said is that that is the case, that the government made an
17 offer, you rejected that offer.

18 MR. SCHACHT: Your Honor, I just feel like the record
19 needs to be clear though, or clearer. You're using the word
20 "offer," we can dispute that --

21 THE COURT: The offer being --

22 MR. SCHACHT: The offer being life in prison, a
23 guidelines of life in prison. Most normal people who speak
24 English don't think guidelines of life in prison is an offer.

25 THE COURT: Whether it's an offer or not is not the

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1 point. They offered you to accept a plea which would involve a
2 guidelines sentence of life imprisonment.

3 Is that right, Ms. Houle?

4 MS. HOULE: Yes, your Honor.

5 THE COURT: Is it mandatory minimum life?

6 MS. HOULE: No, your Honor, a mandatory minimum of ten
7 years or mandatory ten-year sentence on one of the charges.

8 THE COURT: What's my discretion at sentencing?

9 MS. HOULE: It would have been ten years to life.

10 THE COURT: Okay. So your offer to take a plea was
11 that Mr. Kourani would expose himself, if he pleaded guilty, to
12 a sentence that I would give that would have a range of ten
13 years to life.

14 MS. HOULE: That's correct.

15 THE COURT: Is that what you understood, Mr. Kourani?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Mr. Schacht, the offer is not to life
18 imprisonment, it's ten years to life.

19 MR. SCHACHT: I agree. I agree.

20 THE COURT: Mr. Kourani understood that and rejected
21 the plea. Rejected, decided not to plead guilty.

22 MR. SCHACHT: Yes.

23 THE COURT: And stands on his constitutional right go
24 to trial.

25 MR. SCHACHT: Yes, your Honor.

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1 THE COURT: Ms. Houle, what else?

2 MS. HOULE: Your Honor asked that we confirm at this
3 conference that we produced 3500. We have, your Honor. To the
4 extent that we meet with witnesses through the rest of this
5 week or weekend we will produce those additional materials on a
6 rolling basis.

7 THE COURT: Anything, Mr. Schacht?

8 MR. SCHACHT: Yes, your Honor. The only remaining
9 issue from my perspective is I submitted certain voir dire
10 questions in a document of April 20, my proposed voir dire
11 questions. And it's quite important, your Honor, to my client,
12 that your Honor in some way, shape or form, ask the questions
13 or the substance of the questions that I proposed in really
14 most importantly like questions 12 to 15.

15 THE COURT: What do you want me to focus on?

16 MR. SCHACHT: Your Honor, I want you in the voir dire
17 to in some way ask questions specially of the potential jurors
18 regarding anti-Arab and anti-Muslim bias.

19 THE COURT: I will to that. Let me told you how I
20 will do it. First, I will ask general questions on their
21 ability to serve on the case; they don't know what kind of case
22 it is, just a matter of time. And I will tell them that it
23 will be a trial that should finish within two weeks. Right?

24 MR. SCHACHT: Yes, I agree.

25 MS. HOULE: Yes, your Honor.

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1 THE COURT: And then I discuss what the indictment is
2 generally, just a matter of accusations, not proof. I tell
3 them it's the government's burden of proof to establish beyond
4 a reasonable doubt that the defendant is guilty of the crime
5 charged in the indictment, that the defendant has pleaded not
6 guilty to the indictment, and that means that these are issues
7 of fact that must be tried and decided by the jurors based
8 solely on the evidence you will hear presented in court. Then
9 I talk about the burden of the government and the presumption
10 of innocence. So I cover all those grounds and I think those
11 cover most of your questions.

12 And then I introduce counsel from the government, and
13 then I introduce defendant and counsel for the defendant. And
14 I ask this question: I say defendant is an Arab and a Muslim.
15 He has the same rights under our Constitution as would a
16 defendant of any other ethnicity or religion. Is there anyone
17 who feels that they cannot be fair to him because of his
18 ethnicity and religion. Are you okay with that?

19 MR. SCHACHT: Yes, I'm okay with that, thank you.

20 Also one of the other questions I think that I
21 highlighted was there have been news articles about the case,
22 it's possible there will be news articles during the trial. I
23 think asking whether they have any prior knowledge of the case
24 might be appropriate.

25 THE COURT: I give a brief summary of the indictment.

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1 I don't show the indictment. I ask: Prior to today have you
2 heard of Hezbollah? Since 1997 the U.S. Secretary of State has
3 designated Hezbollah as a foreign terrorist organization. Some
4 of the evidence in this case will relate to Hezbollah's
5 involvement in military conflicts in foreign countries, which
6 may include Israel, Lebanon, Iran and Syria. Do you have an
7 opinion about Hezbollah, its designation as a foreign terrorist
8 organization, or about military conflicts in the countries that
9 I mentioned that would affect your ability to be fair and
10 impartial in this case?

11 MR. SCHACHT: I consent to that, thank you.

12 THE COURT: I go on.

13 As you can tell from the trial, you will hear evidence
14 concerning allegations of the provision or attempted provision
15 of material support to Hezbollah, receipt or attempt to receive
16 military training from Hezbollah, conspiracy to possess machine
17 guns and destructive devices, and unlawful procurement of U.S.
18 citizenship by naturalization. Do any of you have any
19 independent knowledge about the laws governing such allegations
20 that would prevent you from being fair and impartial?

21 Do you have any opinion about the alleged crimes or
22 laws concerning the alleged crimes that might prevent you from
23 being fair and impartial in this case?

24 Do you speak, read, or understand Arabic? If so, you
25 are required to rely solely on the translator's translation,

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1 not your own.

2 Have you read or heard anything about the case in the
3 newspaper, on the internet, on TV, or by any other source? If
4 so, provide details.

5 This trial may generate media attention. You need to
6 follow my instruction that you should absolutely avoid reading
7 or watching media reports concerning the case, including
8 coverage of the case on social media, such as Facebook,
9 Twitter, Instagram, SnapChat and text blogs until after the
10 case is over.

11 Based on anything that you have read, seen or heard,
12 have you formed any opinion about the defendant Ali Kourani?

13 You may hear evidence at trial of criminal activity
14 committed by people other than the defendant. You may not draw
15 any inference from the fact that those individuals that are not
16 on trial here. You also may not speculate as to the reason why
17 other persons are not on trial here. Would any of you be
18 unable to accept that instruction?

19 I don't think I want to give that. That's part of the
20 charge afterwards.

21 Do you have any bias, prejudice or other feelings for
22 or against -- I will skip that.

23 That's essentially what I will be --

24 MR. SCHACHT: Thank you, your Honor, that's acceptable
25 to us.

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1 THE COURT: That covers your point?

2 MR. SCHACHT: Yes, it does.

3 THE COURT: So as I understand it, the government has
4 proposed and the defendant has accepted the idea of an
5 anonymous jury.

6 MR. SCHACHT: Well, not anonymous from us, no.

7 THE COURT: Tell me what it is.

8 MR. SCHACHT: What we agreed to is that the jurors in
9 public, in the courtroom, will be called by their numbers,
10 whatever their numbers are, but that we in the defense and the
11 government will know who the jurors are. So it's not full
12 anonymity. That's what I consented to.

13 MS. HOULE: Yes, we agree with that, your Honor.

14 THE COURT: Two questions. We were not planning to
15 have names, the jury clerk would send up the jurors for the
16 array each with a number.

17 Say the procedure.

18 DEPUTY CLERK: They send up the cards with a number.
19 We refer to each juror as a number. We don't get their names.

20 THE COURT: We don't see their name and you don't see
21 their name. That's the way we are going to proceed, because I
22 thought you wanted an anonymous jury.

23 MR. SCHACHT: I would object to that for the simple
24 reason that I think -- I don't care if the jurors are anonymous
25 from the public, but I don't want the jurors in their own minds

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1 to think that they need to be anonymous from my client because
2 there's some reason to fear him.

3 THE COURT: So how would you do that?

4 MR. SCHACHT: I have no idea. It was the government's
5 proposal.

6 THE COURT: If the names are going to be known to
7 counsel, why can't we use names?

8 MS. HOULE: The concern is, your Honor, about the
9 jurors' names being said in open court, that there are others
10 who could come to observe the trial who would take note of
11 those jurors' names. So that is why we proposed an anonymous
12 jury.

13 We don't object to -- we agree with defense counsel
14 that it is appropriate for the parties and the Court to know
15 the jurors' names and they should be referred to by their
16 number when described publicly. I wonder, your Honor, if it
17 could be sort of the same procedure as normal where there's a
18 printout that comes up with the names of the jurors, but then
19 they are just given numbers at that point, and that we use
20 those numbers to refer to them publicly.

21 THE COURT: We could try do that, I suppose. What do
22 you propose, three copies come, one for the Court, one for the
23 government and one for the defense?

24 MS. HOULE: That sounds right.

25 THE COURT: We're not sure how this could be

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1 implemented. I think what we need is a conference to
2 conference Mr. Schact and Ms. Houle and Ms. Jones and the jury
3 clerk to see if we could accommodate you. Frankly, I had been
4 planning on having a totally anonymous jury and just refer to
5 them by the number.

6 MR. SCHACHT: I'm happy to participate in a conference
7 with whomever, but I object to a totally anonymous jury.

8 THE COURT: I understand.

9 MS. HOULE: I believe when that printout comes the
10 jurors are already assigned numbers. We would use those
11 numbers when referring to them.

12 THE COURT: Ms. Jones said no.

13 DEPUTY CLERK: They're assigned a number but they're
14 not told that number. If I go juror number one, who is going
15 to come and take a seat in the first chair? They don't know
16 their names when they come up here. They barely know their
17 numbers when we seat them here.

18 MS. HOULE: Does it say the number on the card they're
19 given?

20 DEPUTY CLERK: It does, every juror has a number, but
21 they're not told that number upstairs.

22 MS. HOULE: Is it on the card that they have that they
23 can hand up?

24 DEPUTY CLERK: They don't hand the card, the jury
25 clerk hands them the cards.

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1 THE COURT: We get a stack of cards, we put those
2 cards in this revolving box, Ms. Jones spins the box and takes
3 them out one by one. She uses names, but the numbers would not
4 be evident on the cards in terms of how we would use it.

5 Look, I will do whatever you both want to do, so work
6 it out with Ms. Jones and work it out with the jury clerk.

7 MS. HOULE: Thank you, we will. And I understand that
8 Judge Oetken recently did this in a trial about two months ago,
9 so we will figure out exactly how it was done there.

10 THE COURT: Ms. Thomas, the jury clerk will be coming
11 up here and you can discuss it with her.

12 MS. HOULE: Thank you, your Honor.

13 THE COURT: Anything else?

14 MR. SCHACHT: You addressed all my points. Thank you,
15 your Honor.

16 MS. HOULE: Nothing from the government, thank you,
17 your Honor.

18 THE COURT: So we have rehearsed the procedure. We're
19 going to proceed with 14 people. We will seat the total number
20 of jurors that will equal the number of 14 plus 16 peremptories
21 regarding the 12 and two peremptories regarding the alternates.
22 So we have 32 that we seat.

23 I ask all the questions that I ask. The jurors will
24 give a personal statement in response to who they are and where
25 they went to school and where they grew up, what papers they

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1 read, what the magazines are, what interests they have on the
2 internet. I will give them an instruction throughout not to
3 use the internet, they're not do any research on their own,
4 they're not to be on social media or tell what they're doing.
5 And then we exercise the peremptories.

6 In response to various questions, some jurors will ask
7 to be excused, and we'll decide whether they have an adequate
8 excuse or not generally at the sidebar. Challenges will be
9 made as we go along at the sidebar. I will rule on them. If a
10 juror is excused, another juror will be taken and put in that
11 juror's place and asked the general question is there anything
12 so far that should be brought to my attention.

13 At the end of the process, all the challenges for
14 cause will have been ruled on, ready for peremptories. The
15 peremptories will be done at your table. The government and
16 the defense will each have a piece of paper and a pad and write
17 down the numbers of the jurors as to which they exercise
18 peremptories, ten for the defendant, six for the government.
19 That is as to the first 28 jurors that are seated. At the end
20 of this process -- with regard to these 28, there's another
21 part of the process with the alternates, but with regard to the
22 28, 16 jurors will be excused. If you coincide with any
23 peremptories or don't ask the peremptories, I will excuse the
24 jurors from number 28 down. So at the end of the process there
25 are twelve jurors.

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1 The paper you will write on also will have a space for
2 the alternates, and you will each have one challenge for the
3 alternates, and the alternates will be chosen from jurors 29,
4 30, 31 and 32. Again, if you coincide or don't exercise
5 peremptory, I will excuse jurors from 32 down, so at the end of
6 this process we have twelve jurors plus two alternates.

7 I think if I gave you 15 minutes each that would be
8 sufficient to exercise peremptories.

9 Here is Ms. Thomas.

10 I suggest we go off the record and work this out if
11 that's okay with everybody.

12 MR. SCHACHT: Yes, your Honor.

13 MS. HOULE: That's fine, your Honor.

14 (Off the record)

15 THE COURT: Linda Thomas, jury clerk, has come up to
16 the courtroom and she will address the lawyers and tell us how
17 they can proceed in the way that both sides want.

18 MS. THOMAS: As far as an anonymous jury selection
19 will go, when the jurors are pooled in on the return date that
20 they are expected to be here, they will be given a number, each
21 and every one of the jurors will be given a number. I will
22 have access to their names. So in the courtroom when they come
23 up, they will actually have a card which will have their
24 number. So this way they don't forget, because I think one of
25 the concerns was that may not remember or know what their

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1 number is, but they will have a card which will reflect their
2 juror number. I will be the only one that has access to the
3 names.

4 THE COURT: No, both lawyers want to have access
5 themselves, and so that in public, in the courtroom, the jurors
6 will be referred to only by number.

7 MS. THOMAS: That's fine, because then I will provide
8 you with the usual jury panel list which has the corresponding
9 number and their name, so that list will reflect -- that's the
10 list that you usually get.

11 THE COURT: Yes, and we get one copy, which Ms. Jones
12 gets. We'll need three copies then. And can you each live
13 with one copy?

14 MS. HOULE: Yes, your Honor.

15 MR. SCHACHT: Yes, your Honor.

16 MS. THOMAS: The cards will not have their name.

17 THE COURT: We'll tell the jury to take the first
18 seat, the second seat, the third seat.

19 MS. THOMAS: That's fine. As long as you call out
20 their number, it shouldn't be a problem. The lawyers have to
21 remember not to use their names, because they will have access
22 to the list. So that will be an issue more so in the
23 courtroom, you guys are going to have to remember not to say
24 their name, because now you're going to have access to the
25 names. You just have to be aware that you should only be

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1 referring to them by number.

2 THE COURT: And these numbers -- how many people are
3 you going to send up?

4 MS. THOMAS: You requested 75.

5 THE COURT: So they will be numbered one through 75.

6 MS. THOMAS: One through 75.

7 MS. HOULE: Thank you, your Honor. Understood. And
8 we appreciate the clarification on the procedure.

9 MR. SCHACHT: That procedure is agreeable. Thank you
10 very much.

11 THE COURT: Thank you, Ms. Thomas.

12 I think we're finished. Some other ground rules, the
13 questioning, of course, will be from the podiums, there are
14 two, use either one. And if you want to approach the witness
15 to give them a hard copy of something or other, you needn't ask
16 for permission, you just do it. In addressing the jury, I
17 don't require you to stand at the podium, you could move
18 around. The bar between you and the jury is neutral territory.
19 Don't put papers, don't put books on there, don't lean on it.
20 Separation between you and the jury.

21 I permit and encourage objections during openings,
22 closings, and all arguments. Any objections while the evidence
23 is coming in will just be "objection," there will be no
24 speaking objections. If an issue is going to be coming up,
25 anticipated, bring it to my attention, because once I start I

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1 will not grant any sidebars unless I feel I need it.

2 It would be the normal trial day begins at 10 o'clock,
3 ends at 5 o'clock, unless I have another matter scheduled.
4 We'll have a mid-morning break. We'll have an hour and quarter
5 break for lunch. We may or may not have an afternoon break.
6 That will be the normal way to go. I don't plan to sit on
7 Friday of next week. And I think from what you told me, that
8 we should finish by the very beginning of next week.

9 MS. HOULE: Yes, your Honor.

10 THE COURT: Okay.

11 MS. HOULE: Your Honor, sorry, if we could have one
12 moment?

13 (Pause).

14 THE COURT: The first day of trial we'll need a
15 courtroom larger than this. Check with Brigitte on Friday to
16 find out where that courtroom is.

17 DEPUTY CLERK: Right now it's 23B, but that's subject
18 to change.

19 MS. HOULE: Your Honor, just one point about the
20 objections. As your Honor knows, there was information in this
21 case and evidence that was covered by the Classified
22 Information Procedures Act. To the extent that the defense
23 asks a question or raises an objection that would touch on
24 classified information, we would request to say, "Objection,
25 CIPA," so that your Honor understands the basis for our

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1 objection, and that that could require further discussion at a
2 sidebar.

3 THE COURT: I just want you to object, I can then
4 rule. If I can't rule -- I see, if you want to object, just
5 object and I will rule, and if you need further consideration
6 you will tell me that this needs a sidebar suggestion.

7 MS. HOULE: Understood, your Honor.

8 THE COURT: Okay, I think we're finished. I will see
9 you tomorrow at 2:30 or Monday at 10.

10 MR. SCHACHT: Thank you very much.

11 MS. HOULE: Thank you, your Honor.

12 (Adjourned)